OBSERVATIONS

ON THE

Proceedings by Elegit

FOR

RECOVERY OF JUDGMENT DEBTS:

PARTICULARLY APPLIED TO CASES WHERE THERE ARE SUBSISTING LEASES PRIOR TO THE JUDGMENT,

IN THE COURSE OF WHICH

THE EFFECT OF A LATE DECISION IS CONSIDERED,

AND

A NEW METHOD OF PROCEEDING PROPOSED.

By T. LEFROY, Esq.
BARRISTER AT LAW.

Nec enim ulla res vehementius republicam continet, quam fides; quæ esse nulla potest nisi erit necessaria solutio rerum creditarum.

CICERO.

DUBLIN:
PRINTED BY GEORGE GRIERSON.—1802.

PREFACE.

THE practice of borrowing money upon bond with a warrant of attorney for confessing judgment, having so long existed in this country, it is not surprizing, that Judgments should have become a very prevailing species of private security. The sanction which the legislature has given to the assignment of them has contributed to the same effect. On this ground alone, even without a view to adversary actions, it would seem to be a matter of some utility to endeavour to obviate any difficulties in the recovery of judgment debts, and to simplify the modes of proceeding thereon. An attempt of this sort, in respect to that species of execution, from which judgments derive their most extensive and permanent efficacy, has a peculiar claim to indulgence. Those who have had occasion to advert to this subject, since a late decision*, must have felt considerable embarrassment respecting the ordinary course of proceeding upon elegit,

* *Doe ex demiss Da* Costa *v.* Wharton, 8 Term. Rep. Infra, p. 10.

elegit, wherever there are subsisting leases *prior* to the judgment. It seems that an ejectment cannot longer be maintained in such cases, for the purpose of getting into possession of the rents and profits, It is therefore conceived that an attempt to point out some other course as a substitute for that, which has hitherto prevailed in these instances, may not be unacceptable to the Profession. It may not be uninteresting either to others, who are perhaps more particularly concerned, in having these(in some degree) common assurances of the realm, stand on the best foundation as to remedy and effect. Upon this ground the following pages are made public; convinced as the writer is how much they must stand in need of indulgence, he is not less persuaded of the liberality of that Profession for whose perusal they are more particularly intended.

Stephen's-green,
January 26, 1802.

CONTENTS.

INTRODUCTION.

Page.

Short Account of land being made liable to execution for judgment debts.—Origin of the elegit.—Usual course of proceeding thereon.—The late decision.—Effect of it. 1 *to* 18

SECT. I.

New method of proceeding proposed.—Considerations on it divided into two heads.—First head considered on principle.—On authority. - - - 12 *to* 18

SECT. II.

Second head considered on principle.—On authority.—Objections considered.—Conclusion. 18 *et seq.*

OBSERVATIONS

ON THE

RECOVERY OF JUDGMENT DEBTS BY ELEGIT.

INTRODUCTION.

BY the antient common law, the freehold or inheritance of the debtor was not liable to be taken in execution, except in favor the royal prerogative for debts due to the crown, or in the case of an heir,* when specially bound by his ancestor.

2 Inst. 394. 3. Co. 11. 2 Bulst. 63. Plow. 441. Bac. ab. Execon (A) Gilb. Execon 32

Different reasons are assigned for this exemption. Lord *Coke* says, "the land was not liable "to be taken in execution (except in some spe- "cial cases,) lest it might interrupt the follow-

* It may appear strange, that the land which was not liable in the hands of the ancestor for his own personal debt, should yet become chargeable therewith in the hands of the heir. But this was so of necessity; for as the law allowed the ancestor to charge the heir by express words; if in such case it did not give an execution against the land descended, the creditor could have no fruit of an action against the heir, *(qua heir)*, as the *goods* and *chattels* of the ancestor go to his personal representative. 3 Co. Rep. 12. a.

" ing of husbandry and tillage, which are so " beneficial to the common-wealth." *Gilbert* says, "the reason why the common law subjected " only the personal estate to the payment of " debts, seems to be, for that it was only a " chattel that was lent, and therefore the chat- " tels of the debtor were only liable to pay it, " and formerly men trusted one another no " further than they had visible chattels to answer " the debt; the lands were not liable, because " they were obliged to answer the duties to the " feudal lord, and a new tenant could not be " forced on him without his consent in the " alienation."

Accordingly, we find the only writs of execution for debt, known to the common law in ordinary cases, were the *fieri facias* and *levari facias*. By the first, the goods and chattels of the debtor could alone be taken in execution. By the *levari*, though the sheriff was directed to levy the debt off the *land* and chattels of the debtor, yet he could not, by force thereof, meddle with the freehold or inheritance, so as to *extend* or *deliver them in possession* to the creditor; he could only collect the debt out of the *present profits* of the land, such as the corn or grass growing thereon, or the rents due thereout; but the *land itself* he could not in any manner take in execution.

Co. Lit. 290. b.

Plow. 441. 3 Co. 11. 12.

By degrees, however, the feudal restraints on the alienation of land, became less rigid; men also begun to set higher value on personal property, and the introduction of trade and commerce brought with them, at the same time, a necessity and a wish to enlarge the sphere of private credit; an end, at all times, most effectually

tually attained by enlarging the fund to which the creditor may resort for satisfaction.

When these principles began to operate, there was fortunately a Prince* on the throne, who, on all occasions displayed the greatest zeal and application to improve our system of jurisprudence, and, by the interference of the legislature to correct, either the original or adventitious defects of the cammon law, and to modify it according to the growing occasionsof his people.

About the thirteenth year of his reign the two first statutes were passed which subjected freehold property to execution for debt; one was the stat. of *Acton Burnel*, by which the whole land was made liable to execution on a statute merchant, a new security introduced for the convenience of merchants, and as an encouragement to trade and commerce; but this law was necessarily confined in its relief, and only gave to that particular contract in use amongst merchants the effect of landed security; but shortly after was passed the other statute, and one of much more general concern, that of *Westm.* 2d. ch. 18. by which, in every case between subject and subject, a moiety of the land was made liable to execution upon a judgment for debt or damages. 11 or 13 Ed. 1. 13 Ed. 1. ch. 18.

By this last statute (which is the foundation of whatever force judgments between private persons have at this day to affect real property,) it is enacted, "that when debt is recovered or "acknowledged in the King's Courts, or "damages awarded, it shall be, from thence-"forth, in the election of him that sueth for

* Edward the First denominated afterwards The English Justinian.

"such debt or damages to have a writ of *fieri* "*facias* to the sheriff, for to levy the debt off "the lands and goods,* or that the sheriff shall "deliver to him all the chattels of the debtor, "(saving only his oxen and beasts of his "plough) *and the one half of his land*, until the "debt be levied, upon a reasonable price or "extent; and if he be put out of that tenement, "he shall recover by a writ of novel *disseizin*, "and after by a writ of *redisseizin*, if need be."

Thus an option was given to the creditor either to make use of the old common law execution, by *fieri facias* or *levari*, or to take a new writ under this statute, by which he might, instead of the chattels of the debtor and the present profits of his land, take the chattels and also a moiety of the *land itself* in execution; and accordingly, upon this statute was framed the writ of ELEGIT, so called from th words of the Stat "fit *in electione*."

Fitz. N. B. 8vo, 588. Lilly Ent. 671.

By this writ after reciting the judgment, and that the plaintiff hath elected this mode of execution, the sheriff is commanded, that "he cause to be delivered to the said A. B. (*the* "*plaintiff*) all the goods and chattels of the "said C. D. (*the defendant*) in his bailiwick, saving "only his oxen and beasts of plough), and "also one half of all the lands and tene- "ments of the said C. D. (*the defendant*) in his baili-

* The wording of the statute is somewhat obscure, but the meaning is, that the party shall in future have either of the old writs of *fi, fa*, or *levari facias*, by one of which the debt might be levied off the goods, and by the other off the goods and *present profits* of the land; or he shall at his election, have a writ under this statute, (afterwards termed an elegit,) by which he may take the goods and a moiety of the *land itself*. 3 Inst. 394.

"wick

" wick, whereof the said defendant, on
" day next after last past, on which
" day the judgment aforesaid was given, or ever
" after was seized, upon a reasonable price and
" extent, to hold to him (the said plaintiff),
" the said goods and chattels aforesaid, as his
" goods and chattels, and also to hold the one
" half of the lands and tenements aforesaid, as
" his freehold to him and his assigns, according
" to the form of the statute aforesaid, until he
" shall have thereout levied the debt and
" damages aforesaid, &c. &c.

Lord *Coke*, in commenting on the words, 2 Inst. 396.
"upon a reasonable price and extent," observes,
" that thereby is implied, that this appraise-
" ment and extent upon the elegit must be
" found by inquest of twelve men, and so re-
" turned of record;" and accordingly it is as
well the constant practice as the duty of the Bac. ab. Execon, Tidd. Prac. K. B. 752.
sheriff in the execution of this writ, to impanel
a jury, who are to make inquiry of all the goods
and chattels of the debtor, and to appraise the
same, and also to inquire of what lands and
tenements he was seized at the rendition of
the judgement, or at any time after, what their
value is beyond reprizes, and what part is a fair
and just moiety of the whole.

The sheriff, in his return, annexes this inquisi-
tion to the writ, and adds, after that part of the
inquisition ascertaining the moiety of the land,
" which said half, I the said sheriff, on the day of
" the caption of this inquisition, caused to be de-
" livered to the said (plaintiff) in the said writ
" named, at the reasonable price and extent
" aforesaid, to hold to him and his assigns as
" his freehold, according to the form of the
" statute thereof lately made and provided,
" until

"until he shall have thereout fully levied the "debt and damages aforesaid in the said writ "specified," &c. &c.

3 Keb. 213. 3. T. R. 295. Tidd. Prac. K. B. 754.

Upon the execution of the elegit, it was formerly the custom for the sheriff to give an actual possession of the extended moiety; but that being found to be attended with inconvenience, and sometimes injustice, (as third persons might be turned out without an opportunity of shewing their title,) it became the practice to deliver only a *legal* possession, as to which the return is sufficient evidence, and in order to obtain the actual possession, it became a rule, that the elegit creditor must proceed by *ejectment;* and since then the course has been invarialy so.

Salk. 583.

Having now given a sketch of the origin of the elegit, and the several steps previous to bringing the ejectment to get into actual possession, it leads one naturally to the consideration of some points of title which have arisen upon the trial of the *ejectment*, and have of late years occasioned a variety of opinions.

Year Book, 30 Ed. 3. fol. 24. 42 Ed. 3. 11. Lib. Assiss. An. 42 Pl. 17. fol. 261.

The construction upon the statute in question (Scil. West. 2. ch. 18.) was, that upon the land being extended under it, the extent gave the elegit creditor a title *by relation,** *as from* the first

* If this construction had not been made, the great object of the statute would have been defeated; for then it would have been in the power of the debtor, by aliening the lands to deprive the creditor of his remedy against them. But still the law, in establishing this *relation*, has done it with an equitable attention to the interests of third persons; *in fictione juris subsistit æquitas.* It is a general principle that no man, possessing by title, shall be made a trespasser by legal relation.

Accordingly the elegit creditor cannot lay the demise in his ejectment farther back than the *time of the extent* though quoad his *title*, that extent relates back to the judgment, and though

first day of the term* in which the judgment was given, which by subsequent statutes in favour of purchasers and others was limited to the signing and docketting. 7 Wm. 3. ch. 12. 3 Geo. 2, ch. 7.

It is this relation back of the extent which has laid the foundation for saying, that "a "judgment is a lien upon the land." Without any comments on the accuracy of that expression, it may be sufficent to observe, that the whole force of it rests on this relation, which, it was decided in very early times, the actual extent would have to vest a title to the extended moity *as from* the rendition of the judgment. The judgment *per se* certainly does not vest any interest in or title to the land; it is the execution of the elegit, (*scil* the inquisition and extent) which

though he may over-hawl the title of all claiming subsequent to the judgment, yet he shall not by this relation make those trespassers for the time they possessed before his *actual* title accrued. And though he may as to a moiety defeat their title *as from* the judgment, he shall have no action for mesne rates for the time which elapsed between the judgement and the extent, for that would be to make those who entered undertitle trespassers by relation. This accounts for what at first sight might create a difficulty, that the elegit creditor should not be entitled to the mesne rates for a time during which every title that was created was subject to be defeated by his. This distinction between defeating the *title*, and yet not becoming entitled to the mesne rates, will appear still more satisfactory when it is considered, that as to the *title*, thejudgment on record is a sufficient notice; but whether the creditor will ever reduce that latent, and as it were contingent title, into possession by an *actual extent*, rests with himself entirely; and if he might at his option do so, to affect those who enjoyed the lands in the interim, with a responsibility for mesne rates, the lands must remain untenanted and the State, as well as the Debtor, suffer an injury and inconvenience much beyond what this statute was meant to remedy.

* The term being in contemplation of law but as one day, all legal acts (unless otherwise *specially* ordained) relate to the first day.

which first vest an *interest* in the conuzee, and give him a *title* to a moity of the land; and *by relation* he is considered as invested with this title as against the conuzor, from the 1st day of the term in which the judgment is given; and as against purchasers, morgagees, lessees, and all others claiming under the conuzor, as from the signing and docketting of the judgment.

In consequence of this it is obvious, that the elegit creditor might, upon the ejectment, recover the possession as against every person, whether purchaser, mortgagee, lessee, or any other, claiming under the conuzor by title *subsequent* to the signing and docketting of the judgment; on the other hand, it is equally obvious on the same principle, that he can have no pretensions to disturb the possession of any person claiming under a title *prior* to the judgment.

In this latter case, therefore, (*i. e.* where there is a subsisting title or even a lease made by the conuzor *prior* to the judgment) it would have been in the power of the lessee, in strictness, to set it up as a bar to the ejectment, brought by the elegit creditor to get into possession; to avoid which, it became the practice to give notice to the tenants claiming under leases* prior to the judgment, "that it was not meant to disturb "their possession, but only to get into receipt "of a moity of the rents and profits;" and it seems to have been considered, till a late case, that such notice would prevent a lessee, prior to the judgment,

8 Term Rep. 2. Da Costa, v. Wharton, vid. Infra. 10.

* As to mortgagees, purchasers, or any incumbrancers *not paying rent*, it is evident this practice made use of in the case of tenants would not be applicable to them.

Judgment, from setting up his lease as a bar to the elegit creditor*.

I have not been able to find the commencement of this practice respecting elegits, noticed in our books, nor when first it met with the sanction of the courts; nor indeed have I been able to find any thing directly upon the subject till the case just alluded to, and which shall be noticed more fully hereafter; but I conjecture that it must have been borrowed from a similar practice which was permitted in case of mortgages. 8 T. R. 2.

The first mention of it as used by mortgagees is to be found in the case of *White*, lessee of *Wheatley* v. *Hawkins*. In an ejectment brought by a mortgagee, it was decided, that a lessee claiming under a lease prior to the mortgage, and who had been served with notice, "that the "mortgagee did not mean to disturb his posses-"sion, but merely to get into receipt of the "rents," should not be allowed to set up his lease as a bar to the mortgagee. This is the first case which notices this practice with respect to mortgagees, and indeed in the case of *Moss* v. *Gillimore*, it is expressly said by the court and counsel, that it was only a very late practice to allow mortgagees to get into possession of the rents by an ejectment against a tenant holding under a lease *prior* to the mortgage. Bul N. P. 96 Doug 23. note (7.) Doug. 279.

This practice, however, being once allowed with respect to mortgagees, the application of it in favor of

* As the only question which has arisen, or can arise, is with respect to tenants claiming *prior* to the judgement, (for it is evident subsequent lessees can never set up their leases against the elegit creditor,) the following observations are entirely meant to apply to such lessees only whose leases are *prior* to the judgment,

of Elegit creditors was obvious and reasonable, and probably hence it became established that the elegit creditor might, by giving a notice of this kind maintain an ejectment to get into receipt of the rents on leases *prior* to his judgment.

In this instance the strict and antient notion of an ejectment, was certainly departed from. That which was originally a mode to recover the actual possession of the land, was here made use of as a remedy to compel an attornment to one having in strictness no more than a reversionary interest. However, the practice had apparently been sanctioned by many years usage, and even by the acquiescence of the courts and was consonant to the latitude which had been gradually given to the remedy by ejectment. But the current of legal opinions having changed upon the subject in general within some years, and stricter notions having been revived, it is not surprising, that when the accuracy of this practice came to be questioned, it should have met with a check.

8 Term Rep. 2

Accordingly, in a late case of *Doe ex demiss, Da Costa*, v. *Wharton* and *Dixon*, in an ejectment, the plaintiff made title under an elegit against *Wharton*; an objection was made at the trial by the defendants, that *Dixon*, the tenant in possession enjoyed under a lease granted to him by *Wharton, prior* to the date of the plaintiff's judgement, and therefore, that the plaintiff could not recover in this ejectment. To this it was answered on the part of the lessor of the plaintiff, that he had given the tenant notice, "that he did not mean to disturb the "tenant's possession, his object being only to get "into the receipt of the rents and profits of the "estate," and that the defendants ought not to be permitted to set up this objection: But Mr. *J. Laurence*,

Laurence, before whom the cause was tried, was of opinion, that the party who had the legal estate must prevail in an ejectment, and that as the tenants' title accrued prior to that of the lessor of the plaintiff, the latter could not succeed in this ejectment; accordingly, the plaintiff was non-suited. *Chambre* moved to set aside the non-suit, relying on the practice, which he said had continued in opposition to this objection; but the court were clearly of opinion that the objection taken must prevail, and even refused a rule to shew cause.

While this decision stands uncontradicted, it would be at least hazardous to rely on the usual practice in any case similarly circumstanced. This case seems a clear and pointed decision, that an elegit creditor cannot by an ejectment get into possession of the rents and profits where there is a subsisting lease *prior* to his judgment, notwithstanding his giving the usual notice. It would seem, therefore, to be a desirable object if some other mode of proceeding could be pointed out free from the objections to the former, and which could be supported on legal principles and authority. It is with this view that the following observations are submitted to the profession.

SECT.

SECT. 1.

Da Costa, v. Wharton, 3 T. R. 2.

The principle upon which the case just noticed seems to have been decided is, that an ejectment being a remedy to recover the *possession*, is not applicable to a case where the party is entitled, at best, only to a *reversion and rent.*

The difficulty which occurred in that case seems indeed to point almost directly to the means of remedying it.

Upon considering this subject it has occurred, that in such cases, where there are subsisting leases *prior* to the judgment, the conuzee may extend the *reversion and rent* by his elegit, and after such extent, may, without the usual process of ejectment, have all such remedies to recover a moiety of the rent as the conuzor himself might have had for the whole, before the extent, or will have after it for the other moiety. The examination of this point, is the object of the following pages, in which it will be particularly considered, whether the elegit creditor, by giving notice of the *extent* to any tenant holding under a lease prior to the judgment, and requiring him to pay a moiety of his rent, may not, upon default of payment, distrain and avow for the same; and whether in cases of this kind, the usual course by *ejectment* be not only improper, but wholly unnecessary.

The proposition to be considered shall be divided into two branches. 1st. Whether a reversion and rent may be extended upon an elegit. 2d. Whether, when it has been extended, the elegit creditor may, without any further proceeding, give notice to any tenant under a lease prior to the judgment to pay a moiety of his rent, and in default thereof, distrain and avow for

for the same, or make use of any other remedy for the recovery thereof.

As to the first question, the words of the stat. (*West.* 2. ch. 18.) giving the elegit are, that "the sheriff shall deliver to the plaintiff "all the chattels of the debtor, (saving only "his oxen and beasts of the plough,) *and the "one half of his land*, 'medietatem terræ.'" Though the word "land" (or terra) in its *strictest* sense, does not signify *a reversion*, yet when used in a remedial statute, made too in favor of creditors, and which therefore should be most liberally expounded; it would seem no very unwarrantable stretch *on principle* to say, that the word "land" should, in this instance, be taken to include reversions, particularly when we consider that it is said by one of the best authorities known to our antient law, that the proper definition of a reversion is, "*the land "returning.*"

2 Inst. 395.

Plow. 158

It is observable too, that the words used in the writ of elegit, which was framed immediately upon the statute, and must therefore be supposed the best comment on its spirit and meaning, seem strongly to countenance this construction, for it commands the sheriff to deliver a moiety of the lands *and tenements*. Now certainly, under the word "tenement," there is no doubt a reversion may be included; as in its most extensive sense tenement signifies "what- "ever may be holden." It therefore seems to have been considered, by the framers of the writ at least, that the statute meant to include reversions.

Fitz. N. 68. 8vo. 585. 7 Co. 38.

Co. Lit. 6 a. 19 b

Brooke, in his Abridgment, title, "Elegit," Pl. 13. remarks on this circumstance thus:—*Note*— "that

" that although the stat. of *Westm.* only gives " the elegit of *lands*, by express words, never- " theless, all the writs of elegit (as appears, *Lib.* " *Intrac.* fol. 4. and 137. and in the *Jud. Reg.* " are nine precedents) mention a moiety of the " *lands and tenements*, and therefore by the " word ' tenements,' it is evident that the sta- " tute was understood of lands and tenements, " and therefore rents, *and such like*, may be " put in execution by elegit, as well as land."

In a treatise of great authority, from the name it is ascribed to, (*Gilbert*) on executions, page 38-9, it is said expressly, in commenting on this statute, that the judgment binds not only the lands and tenements of which the Defendant is actually seised, but also the reversions on leases for lives and years; and it goes on to say, that though the words of the statute are " medietatem *terræ*," yet this extends to reversions which are comprised under the name " terræ," since they, (*i. e.* the reversions) are land returning to the defendant when the particular estate ceases; and " though this were for- " merly doubted, later resolutions have settled " the law to be so, and that rent charges and " rent services are within the word ' terræ,' " since they are, instead of the land itself; and " if this were not the case, the creditor might " be cheated by turning land into rent:*"

Indeed the same point is to be found in much earlier authorities. In *Rolle*, Ab. it is said to have been resolved by the court in Sir *Thomas Campbell's* case, *Hill.* 10. *Jac*, that if a man lease for

Title Execution (B) pl. 5.)

* *Sed* quere of this reason; for any alienation or charges after the judgment would be overreached by it.

for years, rendering rent, the reversion may be extended on an elegit during the lease, and the tenant by elegit shall have a moiety of the rent *Vide infra* this case more at large,

So, 4 *Leon* 201. a case is stated to this effect: A. leaseth lands to B. for years, rendering rent, with a clause of re-entry for non-payment, and afterwards a judgment in debt is recovered against A. It was holden, that now the moiety of the rent and reversion were extendible by elegit, and upon such extent, and condition [of re-entry] is suspended * during the extent, as well in the lessor as in the party who hath the extent.

So in *Lillington's* case it was held, that if judgment be recovered for debt or damages, the rent which the defendant hath of any estate of freehold is thereby liable to it; and therefore, although he release it after judgment, the plaintiff shall have execution of a moiety by elegit. This was the case of a rent charge: but it proves a *fortiori*, that the rule respecting a reversion and rent would be the same. 1 Co. 38. a.

So, in a much more modern case, it was held by lord *Hardwicke*, that even a sec. reversion expectant on an estate for life, is bound by the judgments of the person in whom it is vested. 2 Eq. cas. ab, 706. Reversion.

In addition to these direct authorities, there are others to be derived from analogous cases.

The legislature, in ordaining what execution should lie upon securities, by statute merchant, statute staple, and recognizance in nature of a statute staple, have expressed themselves in almost the same terms which are used in Statute *West.* 2d. appointing the execution by elegit. Thus the statute 13 *Edw.* 1. in giving execution on the

* Because a condition at common law is not devisable.

the statute merchant, says, "all the goods of "the debtor, and *all his lands*, shall be delivered "to the merchant to hold, until the debt shall be "fully levied."—Again, the 27 *Edw.* 3. Chap. 9. in appointing the execution to be done on a statute staple, says, a writ shall issue to take the body of the debtor, and to seize his *lands and tenements*, goods and chattels.—And the 3. *Hen.* 8 Chap, 6. gives like execution upon recognizances in nature of a statute staple.

It is worthy of remark, that under all these statutes the word "land" has met with a construction much wider than its appropriate and strict meaning, and has been held to comprise reversion and even rentcharges. This, it is conceived, affords a strong argument from analogy, for the same construction in the case of elegits, which, like the executions last mentioned, are merely creatures of the statute law.

3 Leon. 113. Thus it was held in this case by *Manwood*, Chief Baron, that if a lease be made for years with clause of distress, and afterwards the *rent and reversion* are extended on *a statute*, or seised into the king's hands for debt; if the lessee payeth the rent according to the extent, he is not in any danger of the condition, for that now the lessee is compellable to pay it according to the extent.

Noy. 74. So here it is said by the reporter.—Note by the court:—Lessor of a lease for years rendering rent acknowledges a *statute-* and the *reversion* is extended, and the conuzee brought an action of debt for rent arrear and WELL.

Mo. 32. Pl. 104. So too in a case in *Moore*, it was held by all the judges, that if a man seised of a *rent charge* be bound in a *statute merchant*, and afterwards execution is sued upon it, the rent charge shall be extended

extended through the Statute of merchants only says that the goods of the debtor and all his *lands* shall be delivered in execution, and does not speak of *tenements*.

All these cases on statute merchants and statute staples, with others which shall be noticed here after, but which, from bearing more directly on the second branch of this question, are deferred till that comes to be considered, are, it is conceived in close analogy with executions on elegit. In both instances, the execution is given by statute, in terms either precisely the same or of very nearly the same import; the statutes being all made *pari materia*, should have a like construction; and that construction, from their being in favour of creditors, should be of the most liberal kind. It is therefore conceived, that the last mentioned class of cases concurs very strongly with the other authorities before mentioned, to maintain the first branch of the proposition to be established.

SECT. II.

HAVING, as it is conceived, established by the preceding authorities, that when there is a subsisting lease prior to the judgment, the elegit creditor may extend a moiety of the reversion and rent, (*qua* a reversion and rent) it comes next to be considered whether he may not, by giving the Tenant notice of such extent, and without the usual process of an Ejectment, compel a payment of the accruing rent, either by destraining after notice, or by action of Debt or any other mode which the lessor himself might have used.

It would seem indeed to follow, as an immediate necessary consequence, that he who had thus by act of law acquired an estate, for so much, in the reversion, should have inherently all the incidents necessary to the compleat enjoyment of that estate: It would seem to be absurd for the law to allow the elegit creditor to extend the reversion, and yet not entitle him at once to use the ordinary modes for making it beneficial, by compelling a payment of the rent incident thereto; *quando Lex aliquid alicui concedit, concedere videtur, & id sine quo res ipsa esse non potest.* The elegit creditor becomes by act of law grantee of a moiety of the reversion and as such, one should suppose, entitled to every remedy for the rent, incident to the estate which the law confers. There is no doubt now, whatever there might have been formerly, that the conuzor, (*i e* the lessor) might, without the concurrence of the lessee, have granted a moiety of the reversion, and the law would immediately

Co. Lit. 155. a.

The cases collected, Bac. Ab Rent. (M) 5th Ed. & Infra, p.

ately have worked an apportionment of the rent, and upon notice to the tenant, (which the statute, 6*th. Anne*, ch. 10. has substituted for attornment) would have entitled the grantee to use all remedies for his moiety of the rent which the grantor himself might have done. If this be so when the party gives the estate, surely the law cannot be less provident to secure to its own grants (and such is the extent by elegit) every beneficial incident of enjoyment which the ordinary grant of parties carries with it.

Still, however, it may appear strange to many of those who are accustomed to the ordinary course of bringing an ejectment in such cases, to supercede that mode; and inconceivable that one so simple as That proposed should be an efficient substitute for it. In addition to the reasoning *a priori*, the authorities which seem to bear upon this branch of the subject shall now be given. Some of them have unavoidably been noticed before, and many of the rest will be also found applicable to the former branch of the question. The two parts of the proposition are so connected, that this repetition became unavoidable.

The first authority I shall mention is one that has been noticed before, as far as was necessary for the first part of the question; it is that in *Roll.* Ab. Title, Execution, (B) pl. 5. given also in the same book, Title, Apportionment, (D), where it is said, in both places, to have been resolved in Sir *Thomas Campbell's* case 10 *Jac.* "that if a man lease for years, rendering rent, "the reversion may be extended on an elegit "during the lease, and the tenant by elegit shall "have a moiety of the rent." As the very question now under consideration must have

Sup. 14.

Campbell's case.

been debated in that case, I endeavoured to find some fuller report of it, but *Roll* does not give any, nor can I find it more at length in any reporter: I have, however, succeeded in finding the pleadings on it; they are in *Winch's* entries, and from the names of the parties, the identity of time, and the point made upon the pleadings, it is beyond doubt the same case, and appears to be as follows.—Debt for rent brought by Sir *Thomas Campbell*, who was tenant by elegit: He declares that one *Harrington* was seised of certain lands, and being so seised, demised them to A. B. whose term came by mesne assignment to the defendant, by which the defendant became possessed; and whilst the defendant was so possessed, and *Harrington* so seised of the reversion, the plaintiff obtained a judgment in C. B. against *Harrington*, and sued out an elegit on it, and extended the land demised *as land in the possession* of *Harrington*, and the sheriff delivered a moiety to the plaintiff, by virtue of which he entered and was possessed according to the statute; and plaintiff being so possessed, defendant entered upon the possession of the plaintiff, *claiming his term* in said moiety, and became thereby possessed thereof; the *reversion* being in said plaintiff by virtue of the execution aforesaid, till he should levy the debt and damages aforesaid; and being so possessed, the rent of the moiety so delivered by the sheriff was in arrear at such a feast, *unde actio accrevit.* To this declaration the defendant demurred generally, thereby directly bringing in question the point now under consideration. *Winch*, besides the pleadings, gives, in a marginal note, the judgment of the court. He says, "it was ruled that the plaintiff should "recover;

Title, Debt, p. 184.

"recover; for although *Harrington* had only a "*reversion* on a lease for years with the rent, "and in was extended as *land in possession*; ne- "vertheless, *Campbell*, the extendor, shall have "the moiety of the reversion and rent, and "so shall have an action of debt on account of "the privity created by law."

One peculiarity is to be remarked in this case; It appears that *Harrington* had in fact but *a reversion*, though it was extended as *land in possession*; and it therefore made part of the question in the case, whether when a reversion was extended as land in possession, such extent was good: but the court decided, that though the extent was made in this manner, yet that the extent of "land," as "*land in possession*," will be a good extent of a "*reversion*," if the conuzor happen to have no more than a *reversion*, and accordingly that this was good extent of the *reversion*, and "so," says the judgment, the plaintiff shall have an action of debt on account of the privity created by law; Thus most explicitly deciding the two points in question, that a reversion may be extended, and that, upon the extent, the extendor may maintain an action of debt for the rent, on the ground before suggested, viz. the privity created by law; which, in giving the moiety of the reversion, gives, *inherently*, the action of debt for the rent; and of course every other remedy arising from this privity.

The case in the margin, which was not long prior to the last, is an indirect authority to the same effect. In replevin, the avowry was, that J. S. seised of lands for the life of his wife *Sybil*, in right of his wife, the reversion in fee to the husband; and his wife made a lease for years without

Walsal *a* Heath, Cro. El. 656.

without writing, reserving 4*l.* rent, per ann. The husband being indebted by obligation, made his wife executrix and died: The obligee brings debt against her by the name of *Isabel*, and recovers: and upon a *devastavit* returned, an elegit was awarded against her own land, and the Sheriff returned "that *Isabel* had 4*l.* rent issuing "out of that land upon a demise made by her "and her husband, and delivers the moiety of "that rent," for which the defendant avows; And it was thereupon demurred, and the avowry was adjudged ill for three reasons: The two first, (one being on the validity of the lease, the other respecting the variance of the name) are not material to the present question; but the third was "for the sheriff delivering the *rent* "without the reversion, it is but as a rent *seck*, "and as *such*, cannot be extended. That is at least an implied authority, that an extent of the *reversion* and rent would have been good, and sustained the distress and avowry.

Watton, *v.* Shirt. Cro. El. 742.

A case in the same book which occurred the next year, is an express authority that a *rent charge* may be extended on an elegit, and that the elegit creditor may distrain and avow for it under the extent, and would therefore seem to make the case stronger for a reversion and rent. On a demurrer to a frivolous plea put in to an avowry, there was a question raised on the avowry itself, whether the extent of two parts of the rent was good, and All the Court, says, the reporter, held that it was; for though by the act of the party the tenant shall not be liable to two distresses, yet by act of law he may; and this act of the sheriff is an act of law, and his delivering the two parts was good.

This

This case was not exposed to the objection taken in the last; here the extent was expressly of a *rent charge*, and of course, with a power of distress. But in the former case, it was neither extended as a *rent charge*, nor yet *with the reversion*, so as to make it a *rent service*; and therefore was merely a *rent seck* and as *such* held not extendible.

Some cases shall now be mentioned, which have been determined on *statutes merchant, staple and recognizances*; and which for the reasons before given, are conceived to afford an argument from analogy. Ante. 17.

One of the first of these cases is in *Dyer*; Cognizance was made by the bailiff of tenant by *statute staple*, who had extended a rent charge, and several objections were taken to the cognizance, which certainly was in many particulars informal; amongst others, the very two questions under consideration were made there. And though on account of the gross informality of the cognizance in other respects, the decision of the court did not turn upon the points in question; the opinion of Sir *James Dyer*, is given most explicitly on them. After mentioning the other objections, he says, it was also moved, that the tenant by statute staple or elegit of a rent, cannot make avowry, because it is not *land*; for the statutes of *Acton Burnel* and *de Mercatoribus*, only speak of *land*, and then it 'was moved, that the remedy for him is by 'assize and not by avowry; but (says 'Dyer,) *it seems to be the contrary*," and see *H.* 13. *Hen.* 4. in *Fitzherbert*, title. Avowrie, cap. 23. (but it is not found in the printed book of this year) there was tenant by statute staple of a rent reserved Dyer, 206,

reserved on a lease for life, and after execution, the rent was in arrear, and he distrained, and made avowrie on the lessee, as his tenant by the manner; and no exception was taken to it.

This last case, which is thus quoted by Sir *James Dyer*, is also given in *Bro.* Ab. statute merchant, *Pl.* 44. and along with it in *Brook.* there is a case mentioned as of 33 *Hen.* 8. which seems to be contrary. But in 2. *Roll.* ab. statute staple, 473, it is said expressly that this case of 33. *Hen.* 8. had been overruled in the 39 *El.* And indeed it is, as will appear hereafter, quite contrary to the current of subsequent authorities; which go to confirm the law as laid down by Sir *James Dyer.*

Co. Lit. 153. a. So most expressly laid down by Lord *Coke* in his commentary on *Littleton*; if a man maketh a lease for life, reserving a rent, and bind himself in a statute, and the conuzee hath the rent extended and delivered to him, he shall distrain for the rent, because he cometh to it by course of law.

Noy, 74. 2 Vent. 328. So in a case noticed before (*vid. sup.* 16.) there is a note by the reporter; Lessor of a lease for years rendering rent, acknowledges a statute, and the reversion is extended, and the conuzee brought an action of debt for rent arrear and WELL,

Cro. Jac. 424. 477. 569. The next case is that of *Harrington* and *Garraway*, which underwent a great deal of deliberation, was argued several times, and on a writ of error; and though the point in question, was open on the pleadings, the law appears to have been so well settled, that it never once was stir'd. That case was debt for rent, on a lease for years,

years, made by Sir *John Harrington* to the defendant, and afterwards Sir *John* was bound to the plaintiff in a statute of 1000*l.* and afterwards this reversion and rent were delivered in extent to the plaintiff, by which he became possessed according to the statute, and the rent was in arrear, *unde actio accrevit.* &c. The defendant pleaded a former statute, acknowledged to Sir *William Cockayne* for 2000*l.* and that this reversion and rent were extended on that statute. Plaintiff replies, that Sir *William Cockayne* after the statute made to him, and the one to the plaintiff, had taken a lease for years of the reversion, and so had suspended the execution upon his statute. Issue being taken on that lease, it was found for the plaintiff; and a motion was made in arrest of judgment by the defendant, *For that,* the extent made to Sir *William C.* could not be avoided by plea, but if there was cause to avoid it, the plaintiff should have done so by *audita querela,* before bringing this action; but that whilst it stood, it was a good extent and bar'd that on the subsequent statute,; and of course that the person having the extent on the prior statute, should have the rent. But the court held, that the extent of Sir *William C*'s statute never was lawful, but was suspended by the lease; and then the plaintiff having well extended on his statute, may well maintain this action. And judgment was given for him.

In this case, we see there was not even a question raised, whether a reversion and rent might be extended on a statute, and an action of debt maintained thereon; That appears to have been admitted on all hands, and the only doubt

doubt was, to *which* of *etendors* the rent was payable.

Cro. Jac. 569. It appears afterwards, that this judgment was reversed in the Exchequer Chamber, for a mere defect in form, because the declation did not state the Inquisition on the extent to have been returned; but no question made as to the principle of the Action.

Pal. 272. There is another case between the same parties, reported in *Palmer*; about a year after the reversal of the former judgment: That one having turn'd finally on a point of form, did not settle the real question between the parties, and naturally give rise to this subsequent case. Upon *nil debet*, a special verdict was found, stating all the matters which had come out on the pleadings in the former case; the same point was made and argued as to the necessity of an *audita querela* to avoid the first extent upon which the court held as before. But no question whatever was made as to the reversion being extendible, and an action of Debt lying by the Conuzee for the rent.

1 Doug. 279. In addition to these more antient authorities; the modern one of *Moss* v. *Gallimore*, seems to afford a strong argument from analogy.

Ib. 23. note. (7) Ib. 281, 282. Sup. 9. For some years previous to that case, it had been the practice for mortgagees, who wished to get into possession of the rents reserved on leases prior to their mortgages, to bring ejectments and serve notice on the tenants, that it was not intended to disturb their possession, but only to

Ante. 9. 10. get into receipt of the rents and profits; a practice, which, as before observed, was probably the foundation of that adopted by elegit creditors. However, in the case of *Moss* v. *Gallimore*, it

it was for the first time attempted by a mortgagee, to break through this practice; He gave notice to a tenant, holding under a lease prior to the mortgage, to pay his rent to him (the mortgagee,) and upon default, he distrained without going through the then usual course of bringing an ejectment to get into possession of the rents and profits.

So unusual was it then to proceed by any other method than ejectment; that we find the tenant brought an action of trespass for the distress, and the case was reserved for the opinion of the Court. One of the principle topics of argument insisted on was the usual course of practice; according to which, it was contended the mortgagee should have brought an ejectment to get into possession of the rents, and not distrained previous thereto. However, the Court in the clearest manner decided, that the mortgagee having got a conveyance of the reversion, and given that notice to the tenant, which the statute had substituted for attornment, had a right to avail himself of all the remedies for his rent, which were incident to the reversion, and of course to distrain; and Lord *M.* observed, that though the usual mode had been to bring an ejectment to get into possession of the rents and profits, it was only a permission granted of late years, and that it was entangled with difficulties. Stat. 6. Anne. ch. 10, *Irish.*

The principle of this decision would seem to apply with equal force to the case of an elegit creditor; if it be true as before attempted to be proved, that He may extend a reversion; that extent is a conveyance of so much of the reversion by *act of law*; and on that account, as operative

ative, at least, as any conveyance by act of party; and the elegit creditor seems thereby to be invested with all the privileges and incidents belonging to that reversion, one of which is the right to distrain for the rent incident thereto. So also may Lord *Mansfield's* observation "that "proceeding by ejectment in the case of mort-"gagees is only a late permission, and entangled "with difficulties," be well applied to the case of elegit creditors pursuing the same course, and it is much to be wished at least, that the same remedy might be found applicable to the two cases so similarly circumstanced.

There are, indeed, some objections, which may at first sight be considered as affording a solid distinction between the cases of a Mortgagee and Elegit creditor, and be thought to make the same course of proceeding inapplicable to both. The mortgagee, in general, obtains a conveyance of the whole reversion, and thereby (when the mortgage is become absolute) becomes entitled to distrain for the *whole* rent: whereas the elegit creditor can extend but a moiety of the reversion, whereby the tenant becomes liable to several distresses. I cannot imagine, that if, in the case of *Moss* against *Gallimore*, it had been only a mortgage of a moiety of the reversion, that that circumstance would have made any difference. It is now fully settled, whatever former opinions might have been, that the owner of the reversion may convey a moiety, or any portion of it; and that the grantee may distrain for a corresponding proportion of the rent; and this is so decided, not merely on the strength of authority, but upon a principle of good sense; for the contrary would lead to a most intolerable restraint

Vide sup. 18.

restraint on alienation, a mischief which the improved policy of later times has so much leaned against; whereas it is in the power of the tenant at all times to secure himself against the alledged inconvenience by a regular payment of his rent: and in case of a landlord disposed to harrass by the exercise of an inconvenient rigor, the law has protected the tenant by requiring, in most cases, a demand, or what amounts to a demand of the rent, at the House or other most notorious place on the Land. If then the law be so held at this day*, that one claiming title to a moiety or other portion of the reversion, by act of party, may distrain for a corresponding portion of the rent: much more will it be so in favour of one coming in by act of law; which was at all times so much privileged, that we find in some of the early cases, whilst it was said, that by act of party the tenant could not be made liable to several distresses, it was held to be otherwise by act of law. But in truth this objection, when considered, will be found to apply so much to the usual course of proceeding as to the mode proposed; for if, according to the present practice, an ejectment be brought to get into possession of a moiety of the rents and profits; the tenants will,

Vide Sir *Thomas Raymond*, Rep. 418. 419.

Cro. El. 742. *Watton* against *Shirt*, ante, 22.

* The inclination of the courts in antient times to lean against a severance of the reversion, arose, probably, from the same feudal reasons as their disposition in Construction to lean to joint tenancies rather than tenancies in common, *scil*, to prevent "splitting of services," *vide* lord *Holts* argument in *Fisher*, v. *Wig*. 1 p. *Wm*. 21. *vide* 1 *Ves*. 166. which were then to be performed by most tenants instead of, or often along with the payment of rent. Since these services have been abolished, the same inconvenience certainly does not exist. The payment of rent to different hands is in no degree to be compared to the inconvenience of performing a variety of feudal services to different persons,

will, after being harrassed by the ejectment, be still liable to several distresses by the lessor and elegit creditor for their respective proportions of the rent, just as much, as if the elegit creditor, instead of an ejectment, had given notice to the tenant to pay a moiety of his rent, and pursued the method by distress as now proposed, and as was done in the case of *Moss* against *Gallimore*. Indeed if convenience alone were to decide the point, there seems every reason for preferring a mode which will afford the creditor a more expeditious discharge of his debt, and will save the debtor from a heavy increase of cost; and there does not seem to be any unbending rule of law against adopting what convenience and justice seem to require.

If it be asked, as a further objection, how, if the usual method be improper and inapplicable, came it ever to be established; or, if established, why not long since detected to be erroneous and therefore altered? Without insisting on the futility of an objection which makes the existence of a practice the proof of its not being erroneous; it may be asked, by way of retorting this argument, how came the same practice to prevail so long in the case of mortgagees, and until the decision in the case of *Moss* against *Gallimore*, and why was not the remedy for it found out till that case? And yet nothing more strange or remote from obvious principles is now proposed than was established in that instance: Besides, the adoption of the present practise by elegit creditors has already in some measure, been accounted for, as a consequence of its introduction by mortgagees, though the same occasion to draw it into question did not occur

occur till lately; and when once a practise is adopted, its continuance, though questionable as to accuracy, is not very unaccountable.

Perhaps it may be further objected in the several instances adduced, of an action brought or a distress maintained by the elegit creditor on an extent of a reversion, that in these cases, possibly an ejectment might have been previously brought, and the party have got into receipt of the rents under it. But to this objection there are several answers.—1st. At the time these cases were decided, it was clear settled law, that no ejectment would lie of a reversion; and it is laid down in the books of that date, and by the Judges of the very first authority, as the leading distinction between a reversion and land in possession, that an ejectment would lie of the latter but not of the former. 2d. Many of the instances before adduced, as affording an argument from analogy, were cases of *rent charges*, of which certainly no ejectment would then or now lie. 3d. It is said by the counsel, and most explicitly recognized by lord *Mansfield* in the case of *Moss* against *Gallimore*, and indeed must appear so to every lawyer at all read in the cases of that time, that it was only "a late practise, and a permission of late years." to bring an ejectment to get into receipt of rents and profits on a reversion. The proper mode in cases of conveyance by act of party, previous to the statute of *Anne*, ch. 6. was by writ to compel attornment: and since that Statute, by notice to the tenant, and in default, to distrain; and in cases of conveyance by act of law, the mode was to give notice to the tenant, (*Moore*, 68, Pl.

Plow. 159.
2 Bulst. 217.

68, Pl. 182.) And it is remarkable, that the last mentioned Statute has now substituted for attornment to the grants of parties, the notice which before that, was sufficient to be given by those alone who claimed by act of law, and to the perfecting of whose title attornment was not necessary.

There still remains another objection to the course proposed, arising from some difficulties attending the practical application of it; and which may appear, at first sight, to render it much more inconvenient than the proceeding by *Ejectment.*

One great advantage which, it must be admitted, attended the proceeding by ejectment, was, that it furnished the elegit creditor, by means of the *Habere*, with a power of compelling an attornment of the tenants whose rents he wished to get into the receipt of, and thus he was provided with the means of enforcing future payments. But in the course proposed, by which the ejectment is to be superseded, it appears, at first sight, a striking difficulty, in what manner the elegit creditor is to be furnished with the materials necessary for sustaining an avowry or action, in case of the tenant being adverse; or even for his defence against an action of *trespass* brought for taking the *distress.* In an avowrie or action for the rent, it will be necessary to set out, if not all the particulars of the demise under which the tenant holds *at least* the rent reserved and the days of payment, and to prove them accordingly on the trial. And even for defence, upon the general issue in an action of trespass, he must be provided with some proof of the tenancy. How to arrive at

at the knowledge of these particulars, necessary for stating them with sufficient accuracy where they must be set out in pleading, or for proving them on the trial in any case, seems a matter of considerable difficulty.

This though an embarrassing, will yet, it is hoped, be proved not to be an insurmountable obstacle. But previously, it may not be irrelevant to observe, that the present is not merely a question of *choice* between two modes of proceeding. If the one hitherto in use, had continued unimpeached, it would have been an idle waste of time to have speculated on any other. But it should be remembered, that the case is otherwise, and that the profession and the public are now put to the alternative, either of abandoning the execution by elegit, wherever there are subsisting leases *prior* to the judgment, or of finding out some mode of rendering it available in such cases, without the aid of an ejectment. It cannot therefore be a sufficient reason for rejecting all at once an expedient for this purpose because it may appear embarrassed with a difficulty, from which the former proceeding was exempt.

It may also be remarked, that the course proposed is not, in this respect, exposed to greater difficulty than is found occasionally to attend some of the ordinary modes of execution, which yet continue to be applied without any sensible inconvenience in the instances alluded to. One of these particularly applicable, is the case of a sale by *fi, fa,* of a chattel interest which happens to have been previously leased to under tenants. The vendee is precisely in the same situation, as to the difficulty in question, with the elegit creditor who extends a reversion; and yet in that instance, either the inconvenience is found

to be so minute in the course of practice, or the remedy applied to it so efficacious, that one scarce finds it pointed at amongst the few other defects of the law; nor has it amongst the many provisions of the legislature in favour of creditors been thought worthy of their interference.

The remedy made use of, in the few instances of the sort just mentioned, wherever the litigious or collusive conduct of the tenant and the defendant in the execution render it necessary, is a bill in equity, to obtain the requisite discovery for enabling the vendee to sue at law for the accruing rents.

If the only object was to discover a remedy without any regard to the facility of it, the last mentioned one might be pointed out as applicable to the case of an elegit creditor extending a reversion. Or perhaps a bill to compel an attornment, might be in some respects a better remedy: and a bill for such purpose is neither new in principle or instance. It was a constant subject of relief in courts of equity, previous to the stat. *Anne*. A case of the kind is to be found even so early as Sir *Francis Moore's* Reports, *fol.* 805. Pl. 1092.

It may be added as a practical, though not a very technical argument in favor of both these remedies, that in very few instances would it be found necessary to go the full length of an equity suit on these occasions, where there could be no prospect of successful resistance. And as an expedient to render success more certain, it might be adviseable for the elegit creditor to have an attested copy of the Judgment, Inquisition and Extent, produced to the tenant, and a notice at the same time served, requiring him to execute an attornment on being indemnified, or perhaps, without

without an indemnity. If the tenant should refuse to comply, and withhold his rent without any just cause, there can be little doubt he would have to pay the costs of a bill to compel an attornment. At all events, the elegit creditor might finally reimburse himself under the extent, the cost fairly incurred in thus rendering his execution effectual, if the conuzor refused to assist him with the counterparts of leases or other documents to enable him to proceed at law against the tenant.

It may also be observed, in extenuation at least of the difficulty in question, that through the medium of a highly useful public institution, (the registry office), the elegit creditor may, in the greater number of instances, acquire the necessary information to enable him to proceed at law to enforce payment of his proportion of the tenant's rent. For though the act does not require the registry of leases for twenty one years or under, where the possession goes along with the lease, yet those for any longer period must be registered, or will not stand in the way of an elegit creditor. And indeed, though the act has made this limit, yet it is, I believe, but little attended to in practice, and the great majority of leases for shorter terms are registered; the generality of tenants considering the registry of their leases as conferring something of original validity. 6th Anne, ch. 2.

These observations, however, are only palliative, and do not go to afford either a full remedy, or at least not so expeditious and simple a one as might be wished. Before any expedient for that purpose comes to be suggested, perhaps it may not be amiss to examine minutely the nature and extent of the difficulty in question.

It must be in the reader's recollection that, by the course proposed, as soon as the reversion has been extended, the elegit creditor becomes entitled to a proportion of the future accruing rents according to his extent; and the difficulty objected is, how, when driven by an adverse tenant to enforce this right by the ordinary modes of action or distress, he is to furnish himself with the materials necessary for these purposes.

To begin with the more simple case. If we suppose a distress made, and the tenant to bring an action of trespass; there can be little doubt that under the stat. 15. *Geo.* 2. ch. 8. sec. 10. *Irish*, the elegit creditor might plead the general issue, and give the special matter in evidence. The words of the act are abundantly comprehensive to include him, and there is nothing in the spirit or intent to the contrary. This would at once relieve him from all risque of taking upon himself to state the particulars of the demise under which the tenant held, and under which the distress must be justified. It would be sufficient to shew that the tenant held by any demise from the conuzor, which might be proved sufficiently on the part of the elegit creditor, by proving a payment of rent, or any other acknowledgment by the tenant of such a holding. This would let in evidence of the extent of the conuzor's interest, from which time a moiety of the rent becomes payable to the elegit creditor; and it would then lie on the tennnt to shew that he had paid it.

It is conceived that if the tenant refused to produce his lease, evidence *aliunde* would be admissable to prove his holding under the conuzor, and

and that very slight proof would be sufficient, *primâ facie*, for this purpose. The law does not suppose the elegit creditor to be in possession of the regular evidence to prove it; and if the tenant do really hold under any other person, he has in his own power the means of shewing it. 5 Co. 75. a. 10 Co. 94. b.

It is also conceived, that after proving any tenure between the conuzor and the tenant, the inquisition and extent would be admissible evidence; not for the purpose of proving the conuzor's title, as to which they are no evidence against a third person; but after proof of that *aliunde*, the inquisition and extent would be good evidence to shew the *transfer* of that title; and admissible for that purpose, exactly as a *conveyance* of a moiety of the reversion by the conuzor would be. Neither would prove any title *adverse* to the tenant, but one *in privity* with his.

A circumstance too, which would considerably facilitate the defence in this action, would be, that the tenant must begin with the proof of his case; in the course of which, in many instances, much might be collected to serve the defendant's purpose that could not be otherwise got at.

But in truth it is not from this *species* of action the elegit creditor could have much to apprehend. His chief embarrasment would arise on a *replevin*, which would oblige him to state in his avowry, *at least* the rent at which the tenant held, and the days of payment,* and to prove both accordingly. It is from this risque

* If not entitled to avow *generally*, he will have more to state; but there can be little doubt of his being within the statute for general avowries.

of

of *a variance*, that the peculiar difficulty arises here. In an action of trespass, for the reasons before given, there could be none such.

But even in *replevin*, it is conceived, the elegit creditor might assist himself very materially, and force from the tenant sufficient information respecting these particulars, by the expedient of a double avowry. In one, setting out his title under the elegit and extent, and avowing the taking the *distress* as *damage feasant*:* In the other, avowing as landlord for a moiety of the rent.

vide Barnes, 340, Baynes, v. Ludwidge.

In answer to the first of these avowries, the tenant must either plead his lease or not: If he does not, there is nothing to prevent the avowant succeeding on this avowry†. If the tenant does plead his lease, it will be an answer to this avowry; but it will furnish the avowant with the materials necessary for sustaining the other, and he may abate the first on paying the costs of it, which at that stage of the proceedings cannot be considerable.

Salk. 530.

If the elegit creditor has been able to obtain such previous information as to state truly in the second avowry, the rent and days of payment,

* For this purpose, it would be adviseable to take the inquisition and extent as of land *in possession*, which will be a good extent of the *reversion*, whenever it may be necessary to shew that the conuzor had no more. *Vid. Sup.* 21. *Harrington* v. *Garraway*.

† And the measure of the damages might very fairly be adequate to the moiety of the rent payable by the tenant; for he would appear upon this avowry to have occupied the *locus in quo* with his goods and chattels, *doing damage*, for a space of time during which, if he admitted himself a tenant, the elegit creditor would have a title to a moiety of his rent.

he

he will be furnished by the defendant's plea to the first avowry, with the evidence to these matters. If he has been obliged to state the rent and days of payment at random, he may make both correct, after he has obtained the necessary information from the tenant's plea, by obtaining leave to amend the avowry for rent, on payment of costs and giving the tenant leave to plead *de novo* to that avowry. This is a permission, which under the circumstances, no court would, as it is conceived, refuse to grant on these terms. If the conuzor be instrumental in forcing the elegit creditor to this expedient, by withholding from him the counterparts of tenants' leases, or such other documents as would have simplified the proceeding, there can be little doubt that the elegit creditor would be allowed, on any account to be afterwards taken on the foot of his extent, to reimburse himself the costs so occasioned.

Perhaps it may be objected to the expedient proposed, that as tenants in common must join in avowry for *damage feasant*, or one avow for himself and make cognuzance as bailiff of the other: the first avowry could not be sustained by the elegit creditor, if the conuzor were adverse. But when considered, this objection will not be found applicable; for as the inquisition and extent set out the moiety as delivered by metes and bounds, the elegit creditor appears on the face of these proceedings as *sole seized* of the extended moiety. And as to the avowry for rent, it is held, that tenants in common may sever.

Lit. sec. 315. Co. Lit. 198. 2. Hen. Bl. 386.

5 Term. Rep. 246.

It has hitherto been taken for granted, that the elegit creditor is in no better condition than ordinary

ordinary persons, but bound like all others to state precisely in his avowry the demise or contract under which the rent accrues due, and to prove it with corresponding accuracy. Some reasons may be offered, tending to shew that his should be considered as an excepted case out of this general rule. Or even admitting, that the forms of pleading may require some degree of precision, so far at least as to oblige him to state a certain demise or contract, yet there is reason to contend, that if he proved what might be considered as the substance of the issue on his part (*i. e.* that there was a demise or contract, though varying in some particulars from the one stated, and that the rent was in arrear at the time of the distress); that he should be allowed to recover so much as should appear really due and that the tenant should not be allowed in this instance to insist on any point of variance to defeat the avowry.

The reason why, in ordinary cases, any variance between the demise or contract stated and the one proved, is held to be fatal, is conceived to be this that the avowant in these cases is presumed to know, or to have the full means of knowing the demise or contract under which he has a title (if any) to the rent; there is no reason, therefore, to exempt him from the general rules of law, which require a party setting up a claim to state his title to it with precision, and to make his proof accord with his statement. In ordinary cases, the avowant has either himself made the demise or contract, or it has been made by some person under whose grant or other voluntary act, he claims, and by whom therefore, he may furnish himself with all materials necessary for the statement or proof of his title to the

rent

rent. There cannot, therefore, be a shadow of reason for dispensing with any general rule in cases of this kind, in which, if the avowant has *any* title, he must necessarily have the means of ascertaining and proving it to the greatest degree of precision; and in which therefore, defective statement or defective proof of title, may well argue the want of any.

But the case of an elegit creditor is widely different. He acquires title to a portion of the rent due on a demise or contract not made by himself, or by any person, under whose grant or voluntary act he claims. He has no means of arriving at the knowledge or proof of the particulars of the demise or contract under which his claim arises; both the contracting parties are adverse to him; his title is derived from a proceeding *in invitum*: surely, therefore, his case cannot be classed with the ordinary ones, nor does it seem any violation of legal principle to dispense in this instance with a rigor of proof which in others may be highly reasonable.

The law itself, on the contrary, makes allowance in other particulars for this difficulty attending his situation, and dispenses with some of its most rigid rules in his favour. Thus, we find the case of the elegit creditor to be an antient and allowed exception to the rule requiring *profert* of deeds in pleading, on the ground of impossibility and the manifest hardship and absurdity of requiring that, which he has no means of furnishing himself with. A necessary consequence of this rule was, excusing the production of the original instruments upon the trial, and allowing him to give secondary evidence of such as he was excused making *profert* of in his pleading. The

5 Co. 75. a.
10 Co. 94. b.

The law then, when the demise is by deed, having at all times dispensed with the production of it by the elegit creditor, either in pleading or evidence, on the ground of impossibility; it would seem to be within the reason of this equitable indulgence, whether the demise or contract were by deed or not, that he should not be tied up to prove them precisely as laid; but, if upon the trial, the existence of any demise or contract should be shewn, though variant in some particulars from that stated, yet if it appeared sufficient to maintain the *substance* of the issue on the part of the avowant, that he should recover such proportion of the rent as he should appear actually entitled to.

The *substance* of any issue which could require proof of the demise or contract under which the tenant held, must be whether he actually held as tenant to the conuzor before the extent, so as to hold a moiety or other proportion as tenant to the elegit creditor after, and whether the rent was in arrear at the time of the distress. The *quantum* of the rent is but a *circumstance*, perfectly immaterial as to the *right* of the elegit creditor to recover; and in general, utterly out of his reach to ascertain before-hand with any precision. If then any demise or contract be proved to exist, and that the rent is in arrear, the avowant proves the substance of the issue on his part; for whether the reserved rent be much or little, more or less than stated in the avowry, he is equally entitled to it by the extent, if there be *any* tenure. To what purpose then allow the tenant against the substance of the issue proved, and the justice of the case, to defeat the avowry *altogether*, by shewing a variance between any of the particulars of his tenure

tenure and the one alleged in the avowry, when he himself has withheld the means of stating them truly, and the law admits the impossibility of arriving at the knowledge of them in any other way; when too the variance insisted on, does not go to disprove the *right* to the matter in issue, but only the *quantum* of it. It would really therefore, seem to answer all the purposes of justice, to allow the tenant to avail himself no further of any variance between the demise or contract stated, and that which he may shew actually to exist, than to protect himself against the payment of more than in justice he ought to pay.

It may be observed too, that even on ordinary occasions, it is not for the sake of enabling the tenant to turn round his landlord against the justice of the case, that the objection of a *variance* is allowed to prevail, even though it must be the fault of the landlord, if any should arise. On these occasions, the tenant has (*accidentally* as it were) the benefit of a general rule of evidence, which has been established partly on the grounds before mentioned, and is, no doubt, wisely calculated for the purpose of arriving at truth and justice in the great majority of cases, but which may, in some few instances, be made use of against both. But it should be recollected that the principle of that rule, which was framed for cases arising between the contracting parties themselves or those deriving under them, who are bound to know the contracts they have entered into, and may therefore prove them specifically as they exist, is by no means apcable to the case of third persons coming in by act of law, and whom therefore the law does not presume to have the same reason of knowledge

ledge or the same means of proof: And accordingly it will be found that the long list of cases where variances have been held fatal, arose between persons standing in the former situation.

Nor will the tenant be deprived by this of putting in issue, wherever justice may require it, the precise rent payable by him. Thus, if after fairly disclosing to the elegit creditor the rent really payable, a distress should be made for a greater amount: in such case, by a *tender* of what is really payable, (and which might be afterwards pleaded as to *so much*, and *reins arrears* to the rest) the tenant would, *in effect*, put in issue the precise rent payable by him; and must, as in justice he ought, succeed upon the issue so shaped. In this way it would be open to him to protect his own right against any attempt to infringe upon it, without, at the same time, being indulged in an indefinite liberty of defeating that of others by leaving open to him, upon all occasions, a captious objection not necessary to self protection, and militating with the principles of justice, and even with the reason of the law in analogous cases.

Additional support may be derived in favour of the doctrine in question, from the analogy furnished by the rules of pleading. Thus, tho' in general every person seeking to recover must state his title (where title need be stated) with certainty and precision, and prove it accordingly, yet it is a well known exception, that where the statement of one party's title involves in it the title of his adversary or of any stranger, of which he cannot be supposed conusant, he is allowed to state the title of such person in the most general manner; and this is so, not only with

Comyn. Dig. Pleader. C. 34, 35, 36.

Com. Dig. Pleader, C.42.

with respect to matters of title, but also in respect to every other fact the particulars of which "cannot be intended to be within the knowledge of the party stating it." Cro. El. 65. Ib. 899. 3. 3 Lev. 325, 295.

This is abundantly proved by the authorities in the margin, and several others of the same date. The principle of them is fully recognized in all the modern decisions, one of which (though not so apposite as those before mentioned) is yet worthy of remark for an observation made in giving judgment. That was an action of trespass for breaking and entering the plaintiff's house and expelling him therefrom, the defendant justified, as sheriff, under a writ of *fi. fa.*, and stated that the plaintiff *was possessed of a certain interest in the residue of a certain term of years then to come and unexpired*; it was made a question, whether the plaintiff's interest was stated with sufficient precision for the purpose of the justification. Lord *Kenyon* says, "the sheriff, "who had not the title deeds, could not exactly define what the precise interest was; but he "states that the plaintiff was in possession of a "*certain term*; and it is impossible to suggest "any possession of a certain term that is not "the subject matter of a seizure by the sheriff "under a *fi. fa.*" Taylor, *v.* Cole 3. T. R. 295.

So may it be said in the case of an elegit creditor extending a reversion, and justifying a distress for the rent; he has not the title deeds, nor is he presumed to have them, so as to direct him in stating the particulars of the demise or contract under which the tenant holds; yet there is no imaginable tenancy, that if the reversion be extended, the elegit creditor does not thereby come entitled to a proportion of the rent according to his extent. To

To these observations deduced from legal principles and analogy, may be added what, in a doubtful case where there is no decided authority, ought to have weight; namely, that whilst, on the part of the elegit creditor, justice and convenience are promoted by facilitating his remedy for the rent, no possible hardship or injury can accrue to the tenant. Whilst the extent continues, it is a complete justification to the tenant for paying so much of his rent to the elegit creditor; as it is a payment in obedience to a legal proceeding, which the landlord cannot gainsay, whilst he suffers it to remain in force by the non-payment of the debt.

3 Leon, 113.

Most of what has been said in the course of the foregoing pages will apply, in principle, to the several other remedies for rent, of which the elegit creditor may find it necessary to avail himself. It is therefore unnecessary to protract these observations by a detailed application of them to these several modes of proceeding, particularly as it will be found upon examination that scarce any of them can be considered, upon the whole, as more convenient or practicable than the proceeding by distress.

FINIS.